Supreme Court, U.S.
FILED
MAY 5 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO. 87-1572

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1987

BENACQUISTA, POLSINELLI AND SERAFINI MANAGEMENT CORP.,

Petitioner,

-against-

SAVE THE PINE BUSH, INC.; REZIN ADAMS, JOHN WOLCOTT, GREGORY BELL, MARK PLAAT, LYNNE JACKSON and GENE DAMM, as Officers, Individuals, and Taxpayers,

Respondents.

On Petition For A Writ of Certiorari To Review The Judgment Of The Appellate Division, Third Department, Of The State Of New York.

RESPONDENT'S BRIEF IN OPPOSITION

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The respondents, Save the Pine Bush, et al., respectfully request that this Court deny the petition for a writ of certiorari seeking review of the opinion of the New York State Supreme Court,

Appellate Division, Third Department, in this case. That opinion is reported at 130 AD2d 1, and the New York Court of Appeals denied leave to appeal on October 22, 1987, and December 23, 1987.

REASONS WHY THE WRIT SHOULD BE DENIED

POINT I

THE DECISION BELOW IS NOT FINAL AND THE PETITION FOR A WRIT OF CERTIORARI IS PREMATURE BECAUSE THERE HAS BEEN NO FINAL DISAPPROVAL OF THE SUBDIVISION.

It is well established that "an essential prerequisite" of a regulatory takings claim under the Just Compensation Clause of the Fifth Amendment "is a final and authoritative determination of the type and intensity of development legally permitted on the subject property". MacDonald, Sommer & Frates v. Yolo County, _____ US _____, 106 S.Ct. 2561, 2566 (1986).

This Court has examined the regulatory taking question "by engaging in essentially ad hoc. factual inquiries that have identified several factors -- such as the economic impact of the regulation, its interference

with reasonable investment-backed expectations, and the character of the governmental action -- that have particular significance". MacDonald, Sommer & Frates v. Yolo County, supra, _____ US at _____, 106 S.Ct. at 2566, quoting, Kaiser Aetna v. United States, 444 US 164, 175 (1979). Until a final decision about the type and intensity of development that will be permitted has been obtained, it is impossible for any court to engage in the factual inquiry and apply these factors to a particular regulatory decision to determine whether there has been a taking, that is, whether the regulation "goes too far". See MacDonald, Sommer & Frates v. Yolo County, supra, _____ US at _____, 106 S.Ct. at 2566; Williamson County Regional Planning Commission v. Hamilton

Bank, 473 US 172, 189-190, fn. 11 (1985).

Review of the state court decision in this case is inappropriate because this Court has already considered the issue of whether a denial of a subdivision plan constitutes a taking without just compensation under the Fifth Amendment. In MacDonald, Sommer & Frates v. Yolo County, supra, this Court held that a claim that rejection of a subdivision proposal by a county planning commission constituted a taking without just compensation was premature because the petitioner had not yet received "the Board's 'final definitive position regarding how it will apply the regulations at issue to the particular land in question'". MacDonald, Sommer & Frates v. Yolo County, supra, _____ US at _____, 106 S.Ct. at 2568, quoting, Williamson County Regional Planning

Commission v. Hamilton Bank, supra, 473 US at 191. In MacDonald this Court rejected the idea that an agency denial of a particular subdivision plan was tantamount to a refusal to permit any and all development. 106 S.Ct. at 2568. "The implication is not that future application would be futile, but that a meaningful application has not yet been made." 106 S.Ct. at 2568, fn. 8.

Similarly, where a developer failed to seek a variance which might have allowed it to develop its property in accordance with its proposed subdivision plat and failed to utilize state procedures for just compensation, this Court rejected a takings claim as premature. Williamson County Regional Planning Commission v. Hamilton Bank, supra, 473 US at 189-90, 194; see also,

Agins v. City of Tiburon, 447 US 255, 260 (1980) (takings claim was premature where appellant failed to submit a subdivision plan and instead challenged the zoning ordinances as facially unconstitutional).

In the instant case, the petitioner lacks a final determination of what type and intensity of development will be permitted on the subject property. Petitioner has had no final rejection of its subdivision plat. All that has happened is that the City of Albany Planning Board's decision approving the Karner Meadows residential subdivision plat has been vacated pending submittal of a Final Generic Environmental Impact Statement (hereinafter "FGEIS") that meets the requirements of New York State's Enviromental Quality Review Act (hereinafter "SEQRA"). Matter of Save

the Pine Bush v. Planning Board of the City of Albany, 130 AD2d 1, at 3 (3rd Dept. 1987). Here, the New York courts determined that SEQRA's requirement that the reviewing agency take a "hard look" at the relevant areas of environmental concern was not met without considering the question of the minimum number of acres that the Karner Blue Butterfly, an endangered species, needs in order to survive. Id. at 3-4. SEQRA requires that an adequate environmental impact statement be submitted with an application for approval of a significant "action" such as the subdivision plat herein, and the meaning of the decision below is that the petitioner's application to the Albany Planning Board was deficient. Compare Williamson County Regional Planning Commission v. Hamilton Bank, supra, 473

US at 188-191. When petitioner prepares an adequate FGEIS which addresses the issue of minimum preserve necessary for survival of the endangered species, the petitioner may reapply to the Planning Board of the City of Albany for approval of the same or a different subdivision plat, and then approval of the original or a modified subdivision may be obtained. Id. at 3.

In MacDonald, where appellant had submitted only one subdivision proposal to the County Planning Commission and received a rejection, this Court found consideration of the takings claim was precluded because it was premature. MacDonald, Summer & Frates, supra, _____ US at _____, 106 S.Ct. at 2568. In Agins, this Court found the takings claim premature when appellants failed to submit a subdivision plan and

instead made a facial challenge to the constitutionality of the statute. Agins v. City of Tiburon, supra, 447 US at 260. Here, since there is no way for the courts to know the nature and extent of what development will be permitted on the Karner Meadows property, without a final decision by the Planning Board of the City of Albany, it is not appropriate, or even possible, to adjudicate the constitutional claim at this time. MacDonald, Sommer & Frates, supra, _____ US _____, 106 S.Ct. at 2567.

Petitioner here may resubmit a new subdivision plat with an FGEIS conforming with the directives of the state courts. As SEQRA does not require any particular result as to approval or disapproval of an application [Matter of Jackson v. New York State Urban

Development Corporation, 67 NY2d 400, 417 (1986)], there is no reason for petitioner to claim at this stage the Albany Planning Board will not allow development of its subdivision plat upon submission of an adequate application. The holdings of the New York courts leave open the possibility that substantial development will be permitted on this property upon proper application, and therefore the claim is premature. MacDonald, Summer & Frates v. Yolo County, supra, ____ US at ____, 106 S.Ct. at 2568. This case is a straight forward application of this Court's previous decisions in MacDonald, Williamson, and Agins, and thus does not merit further review.

POINT II

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE DECISION BELOW CORRECTLY INTERPRETS AND APPLIES THE PREVIOUS DECISIONS OF THIS COURT IN THAT THE REQUIREMENT OF AN ENVIRONMENTAL IMPACT STATEMENT WHICH ADDRESSES THE QUESTION OF THE MINIMUM ACREAGE NECESSARY FOR SURVIVAL OF THE KARNER BLUE BUTTERFLY SUBSTANTIALLY ADVANCES THE LEGITIMATE STATE INTEREST OF PRESERVING AN ENDANGERED SPECIES.

The decision below is consistent with the previous decisions of this Court with respect to takings under the Just Compensation Clause of the Fifth Amendment. This Court has "long recognized that land use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land'". Nollan v. California Coastal Commission, 483 US _____, 97 L.Ed.2d 677, 687

(1987), quoting, Agins v. City of Tiburon, 447 US 255, 260 (1980).

This case is a typical environmental case in which a landowner has been temporarily denied the use of land that he prefers--construction of a large, dense, residential subdivision--because he failed to provide complete enough information to satisfy the requirements of the New York environmental review law, SEQRA. Any other uses not requiring submission of an environmental impact statement (hereafter "EIS") are available to the petitioner, and he is free to submit a new application for the same subdivision plat with a new EIS.

The State court's resolution of the issue below was consistent with first prong of Nollan's takings analysis in that the land use regulation does substantially advance a legitimate state

interest. Nollan, supra, 483 US at _____, 97 L.Ed.2d at 687. The land use regulation here is the requirement that an application for a subdivision plat approval be accompanied by an adequate EIS, and this requirement does advance the legitimate state interest of protecting an endangered species, the Karner Blue Butterfly.

In Euclid v. Ambler Realty Co. this Court acknowledged the importance of residential zoning as a legitimate state interest which justifies regulatory control over land use by a property owner. Euclid v. Ambler Realty Co., 273 US 365, 391 (1926).

In Penn Central Transportation Co. v. New York City, this Court acknowledged the importance of landmark preservation as a legitimate state interest and held that the regulation

therein did not constitute a taking. Penn Central Transportation Co. V. New York City, 438 US 104, 129 (1978).

In Agins v. City of Tiburon, this Court found scenic zoning was a legitimate state interest and valid exercise of the police power to protect residents from the ill effects of urbanization. Agins v. City of Tiburon, 447 US 255, 261 (1980). Recently this Court has noted that a broad range of governmental purposes are legitimate State interests. Nollan v. California Coastal Commission, supra, _____ US _____, 97 L.Ed.2d 677, 688 (1987).

In view of the high priority the United States Congress has attached to the protection of endangered species, this Court has held that protection of such endangered species is a legitimate matter of federal concern. See,

Endangered Species Act of 1973, 16 USC §1531 et. seq.; Tennessee Valley Authority v. Hill, 437 US 153, 174 (1978) (Congress intended protection of endangered species, snail darter, to be afforded the highest priority).

The New York Legislature has enacted a state endangered species act [17 1/2 McKinney's Laws of New York, Environmental Conservation Law, Sec. 11-0535]. And the Karner Blue Butterfly, which resides in the Albany Pine Bush, has been designated as an endangered species pursuant to the State Act. 6 Codes Rules and Regulations of the State of New York, Sec. 182.6(a). The court below correctly noted that preservation of the endangered species was the State interest that is being protected, and the court below clearly articulated the direct relationship between an EIS and

the goal of protecting an endangered species:

> [H]ere the Legislature has taken pains to express heightened environmental concern for the Karner Blue butterfly, whose continued existence depends upon the preservation of its singular habitat, by according it endangered species status. If the Legislature's concern is to be respected, as it must be, then the question of minimum acreage needed to ensure the survival of the endangered species and its habitat is to be resolved. In the light of this, the Board's authorization of maximum development of the land involved, without offering any empirical data or other satisfactory documentation to resolve the minimum acreage issue, was an arbitrary and capricious act.
>
> Matter of Save the Pine Bush, Inc. v. Planning Board of the City of Albany, 130 AD2d 1, 4 (3rd Dept. 1987).

As in the case of the Federal Endangered Species Act, protection of the Karner

Blue Butterfly is a legitimate state interest.

In Nollan this Court required a nexus between the state regulatory purpose and the means used to achieve that purpose in order to withstand a takings challenge under the Fifth Amendment. Nollan v. California Coastal Commission, supra, 483 US at _____, 97 L.Ed.2d at 689. In this instance the New York courts have clearly acted in conformity with this Court's requirements in takings cases by requiring a direct relationship between the goal of protection of an endangered species and the means utilized.

The requirement of an EIS which addresses the issue of the minimum acreage substantially advances the purpose of protecting the Karner Blue Butterfly. Under New York law an EIS is:

> "intended to provide detailed information about the effect which the proposed action is likely to have on the environment, to list ways in which any adverse effects of such an action might be minimized, and to suggest alternatives to such an action so as to form the basis for a decision whether or not to undertake or approve such action. The EIS is to be viewed as an environmental 'alarm bell' whose purpose is to alert responsible public officials to environmental changes before they have reached ecological points of no return."
>
> Town of Henrietta v. Department of Environmental Conservation of New York, 76 AD2d 215, 220 (4th Dept. 1980)

In the instant case, the court below has required that the developer, who seeks to build a subdivision in an area which is the habitat of an endangered species, prepare an EIS to assess the habitat size that is necessary to ensure

the species survival. The state courts took seriously their duty under SEQRA to determine whether the Albany City Planning Board identified the relevant area of environmental concern, the threat to the survival of the Karner Blue Butterfly, "and made a reasoned elaboration of the basis for its determination". Matter of Save the Pine Bush, Inc. v. Planning Board of the City of Albany, supra, 130 AD2d 1, at 3.

The court below clearly articulated the direct relationship between the requirement of an EIS and the goal of protecting an endangered species:

> While respondents and BPS suggest that resolution of this issue is "outside the scope of a generic EIS [environmental impact statement]", we deem it precisely the kind of environmental issue that needs to be evaluated when, as here, the habitat of an

> endangered species is at risk (6 NYCRR 182.6[a][2]) and the municipality has opted for maximum development of the land area involved without proposing any substantively salutary mitigating measures which would minimize the adverse environmental effect of its decision; to allow the Board to do otherwise would frustrate the objectives of SEQRA.
>
> Matter of Save the Pine Bush, Inc. v. Planning Board of the City of Albany, supra, 130 AD2d at 4.

In conformity with the precedents of this Court, the requirment of an FGEIS that addresses the question of the minimum number of acres necessary for survival of the Karner Blue Butterfly is tailored to achieve the legitimate state interest sought to be protected by the objectives of SEQRA. Nollan v. California Coastal Commission, supra, 493 US at _____, 97 L.Ed.2d at 670.

Since the New York courts have

adhered to decisions of this Court in fashioning a remedy under SEQRA that is directly related to the legitimate state interest, no new constitutional principle would be advanced by granting certiorari in this case.

Similarly, the lower court carefully avoided "going too far" in denying petitioner use of his land so as to effect an unconstitutional taking. First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 US _____, 96 L.Ed.2d 250, 265 (1987). This Court has consistently stated that a landowner must be denied "all economically viable use" of his property before a takings claim is established. Nollan v. California Coastal Commission, supra, 483 US at _____, 97 L.Ed.2d at 287; Agins v. City of Tiburon, supra, 447 US at 260;

MacDonald, Sommer & Frates v. Yolo County, supra, _____ US _____, 106 S.Ct. at 2566 (land that retains any "reasonable beneficial use" has not been "taken" under the Fifth Amendment).

Here, there is no allegation of a physical occupation of the property upon which the Karner Meadows subdivision is proposed to be constructed, nor has the petitioner been required to convey an easement or other recognized property interest. The right to construct residential subdivision has not even been denied to the petitioners, it has been required only that the petitioner must first prepare an adequate EIS. Nollan v. California Coastal Commission, supra, 483 US at _____, 97 L.Ed.2d at 686.

Petitioner has attempted to satisfy the second prong of the Nollan test by

the conclusory allegation that requiring an EIS which addresses the question of the minimum acreage necessary for survival of the Karner Blue Butterfly itself "destroys any economically viable use of the property". Petitioner's Brief, at p. 17. This argument presents no new issue for resolution since this Court has already held that denial of a particular subdivision plan for a property does not effect an unconstitutional taking. In rejecting a takings claim, this Court has stated that the rejection of a subdivision plan did not destroy all uses of the property since other development is consistent with the county's general plan could occur. MacDonald, Sommer & Frates v. Yolo County, supra, _____ US _____, 106 S.Ct. at 2568-2569.

In the instant case, no

unconstitutional taking occurred because the Karner Meadows residential subdivision as it has been proposed may very well be approved after submittal of an EIS that addresses the minimum acreage issue and shows that the endangered species can survive. Or, since SEQRA does not require any particular result [Matter of Jackson v. New York State Urban Development Corporation, supra, 67 NY2d at 417], the Planning Board of the City of Albany may decide to approve the subdivision even though it will result in the extinction of the Karner Blue Butterfly.

In requiring only that a "hard look" first be taken at the survival of the endangered species, the courts below have not achieved a result in any way inconsistent with the settled precedent of this Court.

CONCLUSION

For the above stated reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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